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E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE ICTY

TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)

SUBJECT: ICTY: PREVIEW OF DEL PONTE JUNE 29 ADDRESS TO UN
SECURITY COUNCIL

Classified By: Legal Counselor Clifton M. Johnson per 1.5(d).

[11.](#) (C) Summary: In her June 29 oral report to the UN Security Council, Carla del Ponte, Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), will highlight several issues from her written report submitted to the Security Council in May. In addition to the expected items concerning the current budget crisis, confirming that she will conclude all investigations and seek final indictments by the end of 2004, and castigating SAM for lack of cooperation, she may also raise four less expected issues with potentially serious implications: the likelihood that the Tribunal will slip from its 2008 completion target, her notion that certain "high-level" indictees may need to be transferred to the region for prosecution by local authorities in order to meet completion strategy targets, the allegation that several fugitives may be in Russia, and a six month deadline for Croatia to apprehend and transfer Gotovina. End summary.

[12.](#) (C) Chief Prosecutor Del Ponte will speak on June 29 immediately following the presentation of ICTY President, Judge Theodor Meron (a preview of Meron's remarks will be reported septel). According to Jean-Daniel Ruch, senior political adviser to Del Ponte, she will repeat the main themes of her written completion strategy report to the Council, which was submitted on May 21. In particular, she will emphasize her commitment to completing the work of the Tribunal according to the strategy endorsed by the Security Council in Resolutions 1503 and 1534 (i.e. concluding all investigations by 2004, all first instance trials by 2008, and all appeals by 2010), but she will note that the timeline for trials and appeals is jeopardized by the degree to which states fail to cooperate in apprehending fugitives, local jurisdictions remain incapable of receiving and trying fairly cases transferred from the ICTY, and the budget crisis forces her to cut important resources.

[13.](#) (C) Conclusion of investigative/indictment phase: Del Ponte will express confidence that OTP will conclude its investigations and issue all remaining indictments by the end of 2004, the target of the completion strategy. She will report a number of staffing and budget decisions that are being made consistent with the reorientation of the OTP to a trial-support mode. This includes the closure of the ICTY office in Skopje, and the scaling down of its office in Pristina, in preparation for closure. She will update her written report by noting that since its submission, the OTP has ceased one investigation, leaving six investigations outstanding that are comprised of eleven suspects. This will result in the need for the ICTY to hold four new trials, as two of the targets could be joined with existing trials. Del Ponte will also report that two indictments referenced in the written report have been confirmed and will be presented to the relevant authorities very soon (reported separately).

[14.](#) (C) Del Ponte will express doubt, however, that all trials in the first instance can be finished by the end of [12008](#). She and President Meron had warned during their Fall reports that slippage was likely and we can expect her to emphasize the increased likelihood of this in her upcoming oral report. (Comment: She has said on a number of occasions that she sees her responsibility primarily in terms of meeting the 2004 deadline and that it is the Trial Chambers, responsibility to meet the 2008 deadline. This elides the fact that the ability to meet the 2008 deadline depends in large measure on the number and nature of the indictments brought before the Tribunal by the OTP and the efficiency with which the cases are tried by the prosecutors. End comment.)

[15.](#) (C) Transfer of cases to domestic jurisdictions: Del Ponte will note that an essential factor in the ICTY's ability to meet the 2008 target is the ability to transfer cases and investigations for trial in local jurisdictions. Her report describes three categories of cases, of which the first is most relevant for completion purposes:

-- Indicted Cases: Twelve cases involving twenty-two indictees below the senior-level threshold, "mostly older

cases concerning relatively lower-level perpetrators." These cases would be transferred pursuant to Rule 11 bis of the Tribunal's Rules which authorize the chambers to refer ICTY indicted cases, irrespective of whether the indictee is in custody, for trial in the territory where the crime was committed, the accused was arrested, or (pursuant to a recent rule change) a third country with jurisdiction.

-- Non-indicted Cases: Nineteen cases involving sixty-seven "medium-level perpetrators" who were not indicted and whose investigations were suspended in 2002. Del Ponte hopes to refer these cases to domestic courts for further investigation and prosecution. Fourteen cases (involving about 50 suspects) would go to Bosnia and Herzegovina, three (involving about 10 suspects) to Croatia, one (involving about six suspects) to Serbia and Montenegro, and one (one or more suspects) to Macedonia. (NB: These would not fall under Rule 11bis but would need to be "referred" under an as-yet identified mechanism.)

-- Rules of the Road and other cases: OTP "has identified thousands of individual perpetrators in respect of whom some evidence has been gathered" but no indictments issued. With respect to these cases, largely drawn from the Rules of the Road program, Del Ponte intends to compile a brief supporting dossier for local prosecutors, who would have responsibility for deciding whether to proceed.

16. (C) One additional category is likely to be controversial. In her written report, Del Ponte suggests, "In order to keep with the timeframe set by the Security Council, it will probably be necessary to transfer to local courts under Rule 11bis a greater number of cases (i.e. more than the 12 involving 22 perpetrators described above), even some involving high-level accused." She is likely to repeat this during her oral presentation. This approach is strongly opposed by ICTY President Meron (see septel). It is also at odds with the Security Council's mandate in UNSCR 1503 that the Tribunal concentrate on "the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction" and transfer "cases involving those who may not bear this level of responsibility." Moreover, the successful transfer of cases even at a lower level of responsibility depends on the capabilities of local courts, about which Del Ponte herself expresses concern. Del Ponte notes "several instances of witness intimidation," and even some "murders (of) witnesses due to appear at the ICTY." In her written submission Del Ponte is dubious of the institutional capabilities of Balkan courts.

17. (C) Rule 28: Del Ponte is also in conflict with Meron over a recent amendment to ICTY Rule 28 that requires judges, before confirming an indictment submitted by the OTP, to ensure that it involves senior leaders suspected of being most responsible for war crimes. Although the amended rule closely tracks the text of paragraph five of UNSCR 1534 and is positive step by the judges to implement that provision, Del Ponte's written report alleges that it is contrary to the Tribunal statute and inconsistent with her independence. Ruch has urged Del Ponte not to reiterate this criticism in her oral remarks because he believes it will invite the Council to expressly reject her interpretation and voice support for the amendment. (Comment: While we are reasonably confident that Del Ponte will heed Ruch's sound advice, it is important for the USG and other Council members to express strong support for the Judge's implementation of the UNSCR 1534 through the recent rule amendment if she persists in questioning it. End comment.)

18. (C) Budget Crisis: Del Ponte will report that the ICTY budget freeze, member-state arrears and a cash-flow crisis are having a significant impact on both OTP morale and its ability to meet completion targets. The budget freeze has made the contract status of many staff uncertain, resulting in many of the best and most experienced individuals looking for work elsewhere. The current prohibition on hiring has meant that OTP has been unable to replace lost staff. Del Ponte will undoubtedly raise this budget crisis as an element that is undermining her ability to implement the completion strategy.

19. (C) State Cooperation with the ICTY: Del Ponte will assess the level of cooperation she is receiving from Zagreb, Sarajevo/Pale and Belgrade, much as she did in her written report. Del Ponte is pleased with the cooperation OTP is receiving from Croatia, stating that she is "convinced (that) the Croatian government is currently doing everything it can." Del Ponte, however, will note that Zagreb has still been unable to arrest Ante Gotovina, and she plans to use her statement before UNSC to set a deadline for Croatian success of six months, phrased as "before my next visit to this body." In Bosnia and Herzegovina OTP notes "increased activities by OHR and SFOR aimed at arresting ICTY fugitives" but laments the lack of success thus far. Her criticism will be phrased by reference to "authorities in BiH," rather than just Republika Srpska because, Ruch says, she wants to

implicitly include SFOR in her criticism. Serbia and Montenegro represents, in her view, the least obliging Balkan state as it "has practically suspended any cooperation with the Tribunal." Her oral report will be "a bit stronger" than her pointed criticism of SAM in her written report, where she states that over 100 requests for documents and 50 requests for waivers are outstanding," and that the authorities "have proven through their behavior in the recent months that they are not ready to execute (ICTY) arrest warrants." She concludes that "Serbia and Montenegro is therefore in breach of its international legal obligations."

110. (C) Russia: In a real break from her written report, Del Ponte may also raise the possibility that some fugitives are in hiding in Russia, suggesting the collusion of Moscow authorities. According to Ruch and Chief of Investigations Patrick Lopez-Terez, OTP has received information that several indictees are in Russia and two actually have known addresses in Moscow. She will tell the Council that she has informed the Russian authorities of this intelligence and is "awaiting their response." (Comment: It remains unclear if this statement will make it into the final speech. End Comment.)

Comment

111. (C) One needs to be prepared for any number of eventualities when Carla Del Ponte makes public appearances because she often departs from the script. Nonetheless, it is possible to anticipate several areas where a U.S. intervention could be warranted. These include (1) a restatement of the U.S. opposition to the transfer of senior figures to domestic jurisdictions for trial; (2) support, if the issue is joined, of the recent amendment of Rule 28 so that the judges can verify that new indictments are indeed of senior level individuals most responsible for war crimes; (3) the continued U.S. concern regarding the non-cooperation of various governments in the region; (4) a welcome of OTP's announcement that it will meet the end of 2004 deadline for the end of investigation and the various initiatives OTP and President Meron have undertaken to improve efficiency of the ICTY process; and (5) our continuing commitment to the ICTY financially and concern about the perilous budget situation and its impact on the ability of the Tribunal to fulfill its mandate.
SOBEL